NO. 56441-6-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON AT TACOMA

Pierce County Superior Court Cause No. 20-2-04347-3

Herbert L. Whitehead, III, Jennifer L. Whitehead, Southwest Enterprises, LLC, Mt. View Enterprise, LLC, Whitehead Consulting, LLC and Whitehead Enterprises, LLC,

Petitioner,
vs.
Kenneth Wren & Alice Wren, et al,

Respondents

PETITIONER'S REPLY BRIEF

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I. REPLY

A. Wren ignores the evidence demonstrating the payments were compensation, not loans. Material issues of fact prevent summary judgment.

Respondent Wren fails to address the primary contention raised in Petitioner's Opening Brief—that the payments made to Whitehead were in fact compensation for services rendered. Instead, Wren brazenly brushes it off as speculation or an argumentative assertion. The vast majority of Respondent's lengthy brief details the apparent accounting prowess of Wren's hired gun—Ms. Bley-Asquith. Ms. Bley's accounting relies on two pieces of evidence. First, Mr. Brautigan's claim that the payments made to Whitehead were loans. Second, that the checks contained the word "loan" in the memo line. However, Ms. Bley-Asquith fails to consider the plethora of other evidence that would indicate that the payments were not loans, but compensation. And because she is a staunch advocate for her longtime friend and employer, Mr. Wren, her opinions and conclusions are partial and biased. Because none of the

payments were truly loans, Ms. Bley-Asquith's entire accounting is severely flawed. Whitehead disputes every single component of her accounting.

Wren fails to address whatsoever the elephant in the room, which is if these payments were truly loans accruing interest, then how was Whitehead otherwise compensated. There were no other payments made to him by Stanford and Sons. It has not been argued by Wren, or Mr. Brautigan, that Whitehead was not working for Stanford and Sons during the relevant period of time. Mr. Brautigan even referred to Whitehead's pay as a "paycheck," which contradicts his claim now that they were loans. CP 692-693. The trial court, when viewing the evidence in the light most favorable to Whitehead, should have considered these facts, and other facts, and the inferences therefrom. *See* CR 56.

Important to this particular case is that the alleged loans were not made in a singular transaction—which is what one would normally find in a standard promissory note transaction

where a lump sum of money is exchanged for the note. In that hypothetical, the note is executed the same day, or about the same day, the money is transferred to the borrower. Thereafter, an accounting is created to account for payments made against the note. In the present case, the payments made to Whitehead extend for a period of many years. As such, each payment is subject to examination and assessment as to whether it was in fact a loan under the 2010 LOC. Mr. Brautigan's self-serving testimony and a note in a memo line is not conclusive that each payment was in fact a loan under the 2010 LOC. Mr. Brautigan's failure to account for the loan or ask for repayment at any time calls into question the legitimacy of his claim. The alleged loans also far exceeded the $250,000 limit contemplated under the 2010 LOC, which further calls into question Wren's theory of the 2010 LOC.

Wren acknowledges that starting in March 2016 the payments to Whitehead were no longer loans. *See* Respondent's Brief at pg. 36. However, it is not as if Whitehead's role and

services to the company suddenly transitioned in a significant way on that date. Stanford and Sons failed to issue Whitehead a W-2 both before and after March 2016—despite acknowledging that the payments to Whitehead after March 2016 were intended to be compensation.

Whitehead acknowledges that the 2010 LOC's effective date is March 14, 2010, however it should be known that the document was not actually created or signed by any party until August 2013—a fact that Mr. Brautigan did not want to admit during his deposition. CP 758-769.

During Mr. Brautigan's deposition, he was dodgy and amnesic to the questions asked of him regarding the 2010 LOC. CP 73-74. He claimed that Whitehead wanted to receive loans, not compensation. When asked why he, the owner and manager of the Stanford and Sons, was allowing this to happen or the circumstances around it, he stated "I'm sure there was in the beginning. I don't know. I don't recall. I don't remember." *Id.*

When questioned why he never asked Whitehead to make a payment, Mr. Brautigan's answers went as follows:

Q. After that, did you ever ask Butch for payments on the 2010 LOC?

A. No.

Q. Why not?

A. I didn't ask him for payments.

Q. I'm just wondering why not.

A. He -- I didn't ask him for payments. That's the answer to the question.

Q. Well, I'm asking why not, Mr. Brautigan.

A. (No response.)

Q. Mr. Brautigan, I'm asking you a question. Why did you not ask him for payments?

A. (No response.)

Q. I mean, come on. You had to know I was going to ask you this today.

A. I didn't ask him for payments.

CP 770.[1] If these payments were loans and Stanford and Sons loaned Whitehead over $800,000 in principal funds over many years, then Mr. Brautigan surely would have had intelligent and exacting explanations for each of these inquiries. But he did not have a good expiation, and for good reason, because he is not being honest about what happened.

Wren argues that they are not susceptible to the defense that Stanford and Sons, vis a vis Mr. Brautigan, had unclean hands in the transactions at issue. *See* Respondent's Brief at pgs. 31-33. However, that is not accurate. Wren was assigned the 2010 LOC, thus stepping into the shoes of Stanford and Sons, and granting Wren rights to all claims under the 2010 LOC, but also subjecting Wren to all defenses that arise naturally from the 2010 LOC. *Puget Sound Nat'l Bank v. Dep't of Revenue*, 123 Wn. 2d 284, 292, 868 P.2d 127 (1994). Because Mr. Brautigan has unclean hands in the execution and implementation of the

[1] The amount of time that passed when Mr. Brautigan was unresponsive is not reflected in the transcript, but rest assured, it was a very long time.

2010 LOC, and the transactions that occurred thereafter, then Wren's claim is subject to that defense.

If the payments were not truly loans, and both Whitehead and Mr. Brautigan have unclean hands in the various transactions they conjured up, then it would be wholly inequitable to allow Wren to be the recipient of this windfall. Wren downplays the assertion that they were made whole after Stanford and Sons abruptly closed, labeling it as irrelevant. It is, however, relevant. First, Wren failed to account for and liquidate assets seized from his dear friend, Mr. Brautigan, which demonstrates a high level of chicanery.[2] If Wren was

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[2] Wren seized $126,458.92 from Mr. Brautigan, but incrementally began to give it back to him and failed to account for it against his loan. CP 684-687. Wren then accepted a deed in lieu of foreclosure for property on Anderson Island owned by Mr. Brautigan. *Id.* However, rather than liquidate the property, as he had done to the Arizona property Whitehead previously owned, he rented the property back to Brautigan for $100 per month. *Id.* Again, Wren failed to account for the home against his loan. *Id.* Had Wren kept the cash and sold the Anderson Island home, he would have been more than whole. *Id.* This lawsuit would never have transpired. It is important to note that Wren did not even sue Mr. Brautigan, a personal guarantor of the Stanford and Sons' loan.

made whole, then allowing Wren to benefit from a $1,664,148.09 judgment stemming from the 2010 LOC would most certainly be a windfall—especially if there were no loans in the first place. Moreover, if Wren was made whole, the question begs why Stanford and Sons, would willingly hand over a valid promissory note, secured by Whitehead's home and other assets, valued at over $1,500,000. Surely, Stanford and Sons would retain that note and then seek to execute on it itself. Of course, Mr. Brautigan never even asked Whitehead for payment in the first place—inexplicably unable to articulate why he would not have done so given the magnitude of the debt. The natural inference is that even Mr. Brautigan believed the 2010 LOC was of no value. However, in Wren's hands, Wren has manipulated it to their benefit—and Mr. Wren has convinced his friend, Mr. Brautigan, to manipulate it with him. Simply put, this is a shakedown.

//

B. The issue of judicial estoppel is not before this court, and even if it were, it would not apply.

Wren argues that judicial estoppel prevents Whitehead's present defense. *See* Respondent's Brief at pgs. 54-57. It is true that this issue was addressed in the trial court. However, the trial judge did not grant summary judgment on this basis. Instead, the court based its ruling on an affirmation that there were no issues of fact. Even if this court were to consider judicial estoppel, it fails for multiple reasons. First, Whitehead has not taken an inconsistent position in a previous court case. Whitehead did not submit the declaration in August 2013—Mr. Brautigan did. Thus, the essential basis for establishing judicial estoppel cannot be met. Second, to the extent Mr. Brautigan's declaration is attributable to Whitehead, it is unclear how exactly it could be used to sustain the present judgment. The declaration was filed in August 2013 and purports to document a debt owed by Whitehead to Stanford and Sons through August 2013. However, Wren's accounting effectively starts in August 2013 and details payments made thereafter. As such, one cannot

conclude that the August 2013 declaration is applicable to payments made after that date. Wren also argues that the court's reversal of summary judgment "would require this Court to bless what would be an admitted" façade. *See* Respondent's Brief at pg. 55. This Court would not be blessing such actions. Instead, it would send the issue back to the trial court for the ultimate fact finder to determine liability—if any. Further, any façade had absolutely nothing to do with, and did not impact, Wren or his loan to Stanford and Sons. Any façade occurred in 2013, well before Wren loaned Stanford and Sons money.

C. If nothing else, the default interest rate should be changed to 12% per annum and any "loan fee" accrued prior to August 2013 should be removed.

i. The default interest rate should be 12% per annum, as required by law.

Wren argues that the 2010 LOC falls within the RCW 19.52.080 business exception to RCW 19.52.020's 12% interest cap. The 2010 LOC expressly states that it was made for "commercial, investment, and personal purposes." CP 1093.

There is no indication in the documentation itself that commercial purposes were to be primary over personal purposes.

When a loan is usurious on its face, the burden is on the lender to show the business exception applies. *Stevens v. Security Pac. Mortgage Corp.*, 53 Wn. App. 507, 768 P.2d 1007, *review denied*, 112 Wn.2d 1023 (1989). While loans no longer have to be *exclusively* business related to fall within the business exception of RCW 19.52.080, they still must be made *primarily* for business purposes. *Jansen v. Nu-West, Inc.*, 102 Wn. App. 432, 442, 6 P.3d 98 (2000).

Wren makes the assertion that because three of the five Makers are limited liability companies and therefore cannot assert a violation of RCW Ch. 19.52, it must somehow be determined as a matter of law that the 2010 LOC was primarily for business and investment purposes. However, this argument does not consider to whom payments were actually made. A review of Wren's spreadsheets shows that the vast majority were

actually made to Herbert ("Butch") Whitehead and not any of the LLC entities. CP 609-613.

Additionally, cases allowing application of the business exception generally have had express language in the loan documents themselves indicating a business purpose. For example, in *Brown v. Giger*, 111 Wn.2d 76, 757 P.2d 523 (1988), the Court found an express lack of personal use:

> Walker's perceptions found expression in the loan documents that CLS prepared for Giger's signature. The application states that the purpose of the loan is "Mini Mart in Jocye [sic], Washington". A standard-form "Customer Agreement", in which Giger agreed to pay CLS a service fee, says:
>
> > For services performed by Consumer Loan Service of Lynnwood, Inc., in connection with the acquisition of a loan *exclusively for investment, business and/or commercial purposes* for Sharon M. Giger [handwritten] ("Customer"), the Customer hereby agrees to pay Consumer Loan Service . . . a fee . . .
>
> (Italics ours.) An escrow agreement states: "This loan is for business purposes only and not for personal use. . . . This loan is for commercial Purposes only."

Brown v. Giger, 111 Wn.2d at 78.

Similarly, in *Pacesetter Real Estate v. Fasules*, 53 Wn. App. 463, 767 P.2d 961 (1989), although it was acknowledged between the parties that the borrower intended to use the loan for both commercial and personal use, the written document controlled:

> Here, there is ample evidence that the Fullers from the outset intended the loans to be advanced to Pacesetter for construction and completion of a combined corporate real estate office-residence. However, it is also clear that the face of the November 27, 1985, $40,000 promissory note contained the following language in bold type: "**This is acknowledged to be a commercial loan.**" Using the *Brown* rationale, the purpose acknowledged on the instrument provides more conclusive evidence than the representations in isolation. Mr. Fuller's vast experience in real estate likewise would raise the expectations of vigilance in entering into such a contractual obligation.

Pacesetter Real Estate v. Fasules, 53 Wn. App. at 472 (emphasis added).

Even the *Jansen v. Nu-West, Inc.* case relied upon by Wren has a specific indication of commercial use: "The promissory note also declares that the purpose of the loan is

exclusively commercial." *Jansen*, 102 Wn. App 432 at 435. None of the loan documents in these business exception cases contain a statement similar to that in the present matter that the loan "is made for commercial, investment and personal purposes."

Wren does not cite any case law where a loan document indicating combined commercial and personal purposes falls with the business exception of RCW 19.52.080. Thus, it fails to meet its burden that the business exception applies in the present matter. For that reason, interest should be limited to 12% per annum.

ii. Any loan fees accrued prior to August 2013 should be removed from the accounting.

Wren asserts Ms. Bley Asquith generously calculated the debt in the light most favorable to Whitehead. *See* Respondent's Brief at pg. 11. Wren claims that Whitehead did not dispute Ms. Bley-Asquith's implementation of initial and annual loan fees prior to any alleged loan being made. However, Whitehead expressly refuted that in the declaration he submitted in response

to the motion for partial summary judgment, stating that "it is unclear how annual fees could be assessed for the 2010 Line of Credit if it was not even executed until August 2013." CP 690. If no money was loaned under the line of credit until August 2013[3], as Wren alleges, then there is no basis for any loan fee to be applied before then, as the loan fee provision expressly states the loan fee is a percentage of the line of credit being utilized at any given time. CP 173. As a result, the loan fees prior to the first alleged loan should be removed form the accounting.

II. CONCLUSION

This Court should completely overturn the order on summary judgment and award Appellant their fees and costs associated with this appeal.

If the Court does not completely overturn the order, it should at the very least send the matter back down to the trial

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[3] *See* CP 609-613 for Wren's accounting of 2010 LOC. Wren applies an initial loan fee and annual loan fees before any money is allegedly loaned to Whitehead.

court for a new accounting reflecting the removal of loan fees accrued prior to August 2013, and setting the default interest rate at 12% per annum.

I hereby certify that, pursuant to RAP 18.7, there are 2,661 words contained in this document.

DATED this 2nd day of September, 2022.

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CERTIFICATE OF SERVICE

Under penalty of perjury under the laws of the State of Washington, I declare that on this 2nd day of SEPTEMBER, 2022, a true copy of this document was filed with the Court of Appeals, Division II and served via e-mail on:

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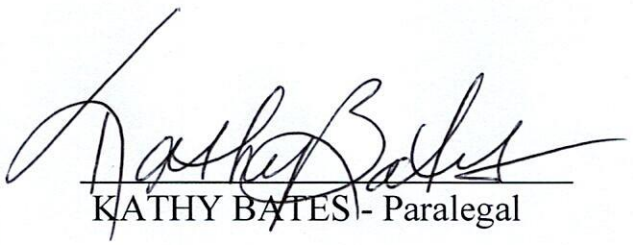

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